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No. 838

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

JACK MILLER AND FRANK LAYTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS

STATEMENT AS TO JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 696

THE UNITED STATES OF AMERICA, APPELLANT

v.

JACK MILLER AND FRANK LAYTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS

STATEMENT OF JURISDICTION OF SUPREME COURT

Filed in U. S. District Court January 30, 1939

[Caption omitted.]

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the

"Criminal Appeals Act," and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the constitutionality of which is involved herein, is Section 11 of the National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236, 1239 (U. S. C. Title 26, Sec. 1132j). Section 11 of the National Firearms Act is as follows:

> It shall be unlawful for any person who is required to register as provided in Section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in Section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.

Section 5 of the National Firearms Act, 48 Stat. 1238 (U. S. C., Title 26, Sec. 1132d), referred to in Section 11 of the Act, is as follows:

> (a) Within sixty days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: Provided, that no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act.

(b) Whenever on trial for a violation of Section 6 hereof the defendant is shown to have or to have had possession of such firearm at any time after such period of sixty days without having registered as required by this section, such possession shall create a presumption that such firearm came into the possession of the defendant subsequent to the effective date of this Act, but this presumption shall not be conclusive.

Section 4 of the National Firearms Act, 48 Stat. 1237 (U. S. C., Title 26, Sec. 1132c), referred to in Section 11 of the Act, is as follows:

(a) It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Commissioner. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this Act: Provided, That if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) The Commissioner, with the approval of the Secretary, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue.

(c) Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Commis-

sioner. The original thereof with stamps affixed, shall be returned to the applicant.

(d) No person shall transfer a firearm which has previously been transferred on or after the effective date of this Act, unless such person, in addition to complying with subsection (c), transfers therewith the stamp-affixed order provided for in this section for each such prior transfer, in compliance with such regulations as may be prescribed under this Act for proof of payment of all taxes on such firearms.

(e) If the transfer of a firearm is exempted from the provisions of this Act as provided in section 13 hereof, the person transferring such firearm shall notify the Commissioner of the name and address of the applicant, the number or other mark identifying such firearm, and the date of its transfer, and shall file with the Commissioner such documents in proof thereof as the Commissioner may by regulations prescribe.

(f) Importers, manufacturers, and dealers who have registered and paid the tax as provided for in section 2 (a) of this Act, shall not be required to conform to the provisions of this section with respect to transactions in firearms with dealers or manufacturers if such dealers or manufacturers have registered and have paid such tax, but shall keep such records and make such reports regarding such transactions as may be prescribed by regulations under this Act.

Section 17 of the National Firearms Act, 48 Stat. 1240 (U. S. C., Title 26, Sec. 1132p), is as follows:

This Act shall take effect on the thirtieth day after the date of its enactment.

The judgment of the District Court sought to be reviewed was entered on January 3, 1939, and an application for appeal was filed on January 30, 1939, and is presented to the District Court herewith, to wit, on this the 30th day of January 1939.

The indictment in this case contains but one count which is based upon Section 11 of the National Firearms Act. The indictment charges that the defendants on the 18th day of April 1938, in the Western District of Arkansas, unlawfully transported in interstate commerce a twelve-gauge Stevens shotgun having a barrel less than eighteen inches in length, the said defendants not having registered said firearm as required by Section 5 of the National Firearms Act and not having in their possession a stamp-affixed order as required by Section 4 of the National Firearms Act and the regulations issued under authority of law.

The defendants interposed a demurrer to the indictment. The court based its decision sustaining the demurrer solely upon the ground that Section 11 of the National Fire-arms Act is invalid as violating the Second Amendment to the Constitution of the United States which provided that "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The question decided by the District Court is substantial and important one and has not hitherto been settled by a decision of the Supreme Court of the United States. It is contrary to the decision in *United States* v. *Adams*, 11 F. Supp. 216 (S. D. Fla.) and it is believed also to be in conflict with the principles enumerated in the decision of the Supreme Court of the United States in *Sonzinsky* v. *United States*, 300 U. S. 506. See also *Robertson* v. *Baldwin*, 165 U. S. 275, 281–282; *Hill* v. *State*, 53 Ga. 472.

The following decisions are believed to sustain the jurisdiction of the Supreme Court:

United States v. *Doremus*, 249 U. S. 86;
United States v. *Sprague*, 282 U. S. 716;
United States v. *Hastings*, 296 U. S. 188;
United States v. *Curtiss Wright Export Corporation*, 299 U. S. 304.

Appended hereto is a copy of the opinion of the court filed January 3, 1939.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

CLINTON R. BARRY,
United States Attorney,
Western District of Arkansas.

MEMORANDUM OPINION

Filed in U. S. District Court January 3, 1939

[Caption omitted.]

MEMORANDUM OPINION

The defendants in this case are charged with unwfully and feloniously transporting in interstate ommerce from the town of Claremore, Oklahoma, the town of Siloam Springs, in the State of rkansas, a double barrel twelve gauge shot gun aving a barrel less than eighteen inches in length, nd at the time of so transporting said fire arm in terstate commerce they did not have in their ossession a stamp-affixed written order for said re arm as required by Section 1132 c., Title 26, . S. C. A., and the regulations issued under the uthority of said Act of Congress known as the ational Fire Arms Act.

The defendants in due time filed a demurrer allenging the sufficiency of the facts stated in the dictment to constitute a crime and further allenging the sections under which said indictent was returned as being in contravention of the econd Amendment to the Constitution of the nited States.

The indictment is based upon the Act of June , 1934, C. 757, Section 11, 48 Statute 1239. The

court is of the opinion that this section is invalid, in that it violates the Second Amendment to the Constitution of the United States, providing: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The demurrer is accordingly sustained.

This the 3rd day of January 1939.

HEARTSILL RAGON,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1939